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No. 82-1734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LINDA SIDOTI PALMORE,
Petitioner,

v.

ANTHONY J. SIDOTI,
Respondent.

On Appeal from the District Court of Appeal of the State of Florida for the Second District

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 36.3 of the Rules of this Court, Ms. Leigh Earls, the Washington Lawyers' Committee for Civil Rights Under Law, the Children's Defense Fund, the Anti-Defamation League of B'nai B'rith and the American Jewish Congress ("*amici*") respectfully request leave to file a brief *amici curiae* in support of the petitioner, Linda Sidoti Palmore. This motion is filed because *amici* have been unable to obtain the written consent of both parties.[1]

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[1] The letters received from counsel for the parties have been lodged with the Clerk.

Amici wish to address the question whether the Equal Protection Clause of the Fourteenth Amendment prohibits a State court from considering or relying upon a subsequent interracial marriage by a natural (custodial) parent as a ground for ordering a change of custody. The interests of *amici* are as follows.

Leigh Earls, a white child who has been raised in an interracial home over the last twelve years, may be adversely affected if the action of the Florida courts is sustained. If courts are permitted to presume, as the Florida courts did, that an interracial home is detrimental to the interests of a white child, she could be taken from her current home. She believes, based on her personal experience, that courts should not be permitted to employ such a presumption. *See* Appendix to the accompanying Brief *Amici Curiae.*

The Lawyers' Committee for Civil Rights Under Law and its Washington, D.C. affiliate have long provided volunteer legal representation in judicial, administrative and legislative proceedings in an attempt to vindicate the constitutional rights of aggrieved persons. The interest of the Washington Lawyers' Committee in this case arises from its commitment to eliminating all forms of unlawful discrimination, ensuring equal protection of the laws and protecting the interests of children.

The Children's Defense Fund is a national public charity representing and providing advocacy on behalf of children, particularly low-income, minority, and handicapped children, and their families. The Children's Defense Fund works through litigation, public education, analysis of public policy and other methods to improve the care and development of children and their economic status. The Children's Defense Fund is committed to the proposition that children will benefit immeasurably from the elimination of discrimination and the fair and equal application of our laws.

The Anti-Defamation League of B'nai B'rith was organized in 1913 as a section of B'nai B'rith, the oldest public service organization of American Jews, to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, be they minority or majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion. Among its many other activities directed to these ends, the Anti-Defamation League has been an active *amicus* participant in this Court.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through the preservation of the rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has filed numerous *amicus* briefs in this Court seeking vindication of the rights of all Americans to full equality regardless of race or religion.

The decision of this Court will have implications extending far beyond the parties before it and will determine whether the courts of this Nation may lawfully control the makeup of families on the basis of racial classifications. In light of these widespread implications, *amici* believe that this Court should have the broadest possible perspective on the question presented. To that end, *amicus* Earls provides the viewpoint of a sixteen year old child who has had firsthand experience in living in an interracial home over the last twelve years. The Washington Lawyers' Committee and the Children's Defense Fund present the perspective of organizations with a firm commitment to ensuring equal protection of our laws and protecting the interests of children. The Anti-

Defamation League and the American Jewish Congress bring to bear a longstanding commitment to protecting the civil rights of all persons. *Amici* believe that State courts in change of custody proceedings should never be permitted to presume that interracial homes are unfit, to use the existence of prejudice in our society as an excuse for employing otherwise offensive racial classifications or to consider race as a relevant factor. These positions and others are set forth in detail in the accompanying brief *amici curiae*.

Respectfully submitted,

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Dated: December 6, 1983

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BRIEF *AMICI CURIAE* OF LEIGH EARLS, THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE CHILDREN'S DEFENSE FUND, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN JEWISH CONGRESS

Ms. Leigh Earls, the Washington Lawyers' Committee for Civil Rights Under Law, the Children's Defense Fund, the Anti-Defamation League of B'nai B'rith and the American Jewish Congress submit this brief *amici curiae* in support of the position of petitioner, Linda Sidoti Palmore. *Amici* will address the question whether the Equal Protection Clause of the Fourteenth Amendment

prohibits a State court from considering or relying upon a subsequent interracial marriage by a natural (custodial) parent as a ground for ordering a change of custody.

INTERESTS OF THE *AMICI CURIAE*

Ms. Leigh Earls, a white child being raised in an interracial home, may be adversely affected if the action of the Florida courts is sustained. If the courts of this Nation are permitted to presume that an interracial home is detrimental to the interests of a white child, she could be taken from her current home. After reading a newspaper article regarding the grant of a writ of certiorari in this case, she composed a letter to this Court, expressing her view that courts should not be permitted to employ such a presumption. The text of the letter is reprinted in the Appendix hereto.[1]

Leigh Earls has been raised by her mother (who is white) and her stepfather (who is black) for over twelve years. During that period, she has lived in various locations (Boston, London, and St. Louis) and attended both public and private schools. In these varied settings, her stepfather's ("dad's") race has not been a significant issue. Her letter states:

> After being raised in an interracial home for over twelve years, I can say that my dad's race makes absolutely no difference to me. Although I worried about it from time to time, I now know that it was always an easy thing to handle. If people were going to judge me by the race of the man my mother chose to marry, I would not have cared to have their friendship, and there probably would have been something else to cause them to dislike me sooner or later.
>
> But of far greater importance is the fact that I have been raised over the last twelve years in a

[1] The signed original of the letter has been lodged with the Clerk.

> happy and stable home. I am fortunate to have had a close and loving relationship with my mom, dad and sister. My home has prepared me to deal with any prejudice that I might have encountered and to recognize that people should not be prejudged. My personal experience has made me a more tolerant, sympathetic and understanding person, qualities which I hope to retain for a lifetime. [Appendix at 5a-6a.]

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of President John F. Kennedy, to involve private attorneys in a national effort to ensure equal rights for all members of our society. The Lawyers' Committee and its Washington, D.C. affiliate have long provided volunteer legal representation in judicial, administrative and legislative proceedings in an attempt to vindicate the constitutional rights of aggrieved persons. Such representation has often involved *amicus* participation in matters before this Court. The interest of the Washington Lawyers' Committee in this case arises from its longstanding commitment to eliminating discrimination, ensuring equal protection of the laws and protecting the interests of children. In recent years, it has twice participated in matters before the Court in which the rights of children were at stake. *See Plyler* v. *Doe*, 457 U.S. 202 (1982); *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

The Children's Defense Fund is a national public charity representing and providing advocacy on behalf of children, particularly low-income, minority, and handicapped children, and their families. The Children's Defense Fund works through litigation, public education, analysis of public policy and other methods to improve the care and development of children and their economic status. The Children's Defense Fund is committed to the proposition that children will benefit immeasurably from the elimination of discrimination and the equal and fair application of our laws.

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The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through the preservation of the rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has filed numerous *amicus* briefs in this Court seeking vindication of the rights of all Americans to full equality regardless of race or religion.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a change of custody proceeding in which the child's natural parents have both remarried. The trial court (the Circuit Court for the Thirteenth

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[2] *See, e.g., Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Comm'n* v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transport Co.*, 427 U.S. 273 (1976); *Bob Jones University* v. *United States*, 51 U.S.L.W. 4593 (May 24, 1983).

Judicial Circuit) found that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectibility [*sic*] of the new spouse of either parent." [3] A pivotal, if not the sole, factor cited by the trial court for revoking petitioner's custody over her daughter (Melanie) was petitioner's remarriage to a black man and the trial court's

> feel[ing] that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from a social stigmatization that is sure to come. [Pet. App. A, ¶ 5.]

The trial court concluded that there was "substantial competent evidence of changed circumstances and that the best interest of the child will be served by awarding custody of the minor child to the father . . . ." *Id.*, ¶ 6. On appeal, the District Court of Appeal of the State of Florida, Second District, affirmed the judgment of the trial court without issuing an opinion. Pet. App. B.

It is important at the outset to place this case in proper context. The case concerns a change of custody determination. To order a change of custody in the Florida courts, "the evidence must show that there has been a substantial change in the condition of the parties and that the best welfare of the child will be promoted by the court's action." *Culpepper* v. *Culpepper*, 408 So.2d 782, 784 (Fla. Dist. Ct. App. 1982). The substantial change in circumstances must have "a direct bearing on the welfare of the child." *Id.* In the *Culpepper* case, "the only change of real consequence occurred when Mrs. Culpepper had an illegitimate child." *Id.* The appellate court reversed the trial court's order changing custody to the father, finding that "[t]here is no evidence that

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[3] Order of Modification of Final Judgment, dated March 1, 1982, Pet. App. A, ¶ 1.

[the child] has been adversely affected in any way by Mrs. Culpepper's conduct." *Id.* at 785.

The instant case also involves the integrity of a family. This Court "has frequently emphasized the importance of the family," *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972):

> The rights to conceive and to raise one's children have been deemed "essential," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May* v. *Anderson*, 345 U.S. 528, 533 (1953). . . . The integrity of the family unit has protection in the Due Process Clause of the Fourteenth Amendment . . . [and] the Equal Protection Clause of the Fourteenth Amendment . . . . [405 U.S. at 651.]

The Court has recognized "that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Id.*, *quoting from Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring). *See also Smith* v. *Organization of Foster Families*, 431 U.S. 816, 842-847, 862-63 (1977). The Court has likewise treated the right to marry as a fundamental civil right. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374, 383-87 (1978).

Against this background, the question presented is whether the State courts of Florida may use a subsequent interracial marriage as a ground for revoking petitioner's custody of her daughter. We submit that they may not.

1. Racial classifications are inherently suspect and subject to the most rigid scrutiny. When a State employs a racial classification, the Court must determine

whether the State has shown a compelling interest to justify that classification.

2. The trial court unquestionably employed a racial classification. It used petitioner's remarriage to a black man as a ground for revoking custody. It did so because of the color of his skin, not because of his personal qualities, education or devotion to the child. Just as a State may not lawfully punish a white woman and a black man for marrying, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967), it may not lawfully use such a marriage as the basis for revoking the woman's custody of her child.

3. The only reason offered by the trial court for using the stepfather's race as a determining factor was its speculation that the child would be socially stigmatized. The mere existence of prejudice in our society, however, does not provide a compelling justification for a State to employ a racial classification. A State court should never yield to prejudice and should not be permitted to use it as an excuse to employ an otherwise offensive racial classification. Nor should it be permitted, under the pretense of avoiding the stigmatization of one person (the white child), to stigmatize others (the black stepfather, as well as other blacks and families with parents of different races).

4. A subsequent interracial marriage should never be a ground for ordering a change of custody. The State's only legitimate interest is in determining whether there has been a significant change in circumstances and what is in the best interest and welfare of the child. There is no reason why those determinations cannot be made without regard to the race of family members. Use of a racial classification, therefore, is not "necessary" to a compelling State interest and is constitutionally invalid. *Loving* v. *Virginia*, *supra*, 388 U.S. at 11.

5. At an absolute minimum, no State court should be permitted to use race as a factor in a change of custody proceeding unless such court finds (i) that it is not

possible to resolve the best interest of the child on racially-neutral terms, (ii) that consideration of race is necessary to a compelling State interest, and (iii) that clear and convincing evidence exists in the record to demonstrate why race is a necessary and relevant consideration in the particular case before it.

ARGUMENT

I. THE FLORIDA COURTS HAVE UNLAWFULLY EMPLOYED A RACIAL CLASSIFICATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. Applicable Standards

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." State courts and judicial officers, like State legislatures, are subject to that command. "[F]rom the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials." *Shelley* v. *Kraemer*, 334 U.S. 1, 18 (1948).

It is equally well settled that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving* v. *Virginia*, *supra*, 388 U.S. at 10. Recognition of that purpose has rendered racial classifications "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), and has subjected them to the "most rigid scrutiny." *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). It has also resulted in the invalidation of numerous racial classifications. *See, e.g., Loving* v. *Virginia*, *supra*, 388 U.S. at 12 (prohibition against interracial marriage); *McLaughlin* v. *Florida*, 379 U.S. 184, 194 (1964) (prohibition against

interracial cohabitation); *Tancil* v. *Woolls*, 379 U.S. 19 (1964) (*per curiam*) (designation of race in voting and property records); *Anderson* v. *Martin*, 375 U.S. 399 (1963) (designation of race on nomination papers and ballots); *Watson* v. *City of Memphis*, 373 U.S. 526 (1962) (segregation in public parks and playgrounds); *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (segregation of public schools).

A racial classification will pass constitutional muster only if shown to advance a governmental interest that is "compelling," *Dunn* v. *Blumstein*, 405 U.S. 330, 342 (1972), *Graham* v. *Richardson*, 403 U.S. 365, 375 (1971), or "overriding." *Loving* v. *Virginia*, *supra*, 388 U.S. at 11; *McLaughlin* v. *Florida*, *supra*, 379 U.S. at 192. The classification must also be shown to be "necessary" to, *Loving* v. *Virginia*, *supra*, 388 U.S. at 11, and "precisely tailored to serve[,] a compelling governmental interest." *Plyler* v. *Doe*, 457 U.S. 202, 217 (1982). Absent such a showing, "the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause." *McLaughlin* v. *Florida*, *supra*, 379 U.S. at 192-93.

B. The Trial Court Employed a Racial Classification, and There Is No Compelling State Interest to Sustain That Classification

The trial court employed a racial classification that is constitutionally suspect and subject to the most rigid scrutiny. The trial court used the petitioner's remarriage to a black man as a pivotal ground for revoking petitioner's custody. The trial court found that it would be detrimental to the white child's interest to be raised by a black stepfather because "it is inevitable that Melanie will . . . suffer from a social stigmatization that is sure to come." Pet. App. A, ¶ 5. It did not find that the black stepfather was unfit. To the contrary, it specifically found that both natural parents had remarried

and that there was no issue as to the devotion to the child, the adequacy of housing or the respectability of the new spouses. *Id.*, ¶ 1.

At bottom, therefore, the stepfather's race, not his personal qualities, education or devotion to the child, was the disqualifying factor. The use of this racial classification, *inter alia*, punishes and stigmatizes petitioner and her new husband for exercising their right to marry and denies petitioner and her child the right to an unprejudiced change of custody determination.

This Court has invalidated racial classifications in closely analogous circumstances. In *McLaughlin* v. *Florida*, *supra*, it struck down a criminal statute making cohabitation by interracial couples unlawful. It held that Florida's exercise of State police power "trenches upon the constitutionally protected freedom from invidious official discrimination based on race." 379 U.S. at 196. Such a law "bears a heavy burden of justification" and "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *Id.* In *Loving* v. *Virginia*, *supra*, the Court similarly invalidated a State law proscribing interracial marriages:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. . . . We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. [388 U.S. at 11-12.]

This case is simply a sequel to *McLaughlin* and *Loving*. Here the trial court has used petitioner's remarriage to a black man as a basis for revoking petitioner's custody of her child. "There is patently no legitimate overriding purpose independent of invidious racial discrimination

which justifies this classification." *Loving* v. *Virginia*, *supra*, 388 U.S. at 11. Just as a State may not lawfully punish a white woman and a black man for marrying, it may not lawfully revoke the woman's custody of her child because of that marriage. Otherwise, the State could do indirectly that which this Court has said it could not do directly—punish individuals because of interracial marriages.

Nor is there a compelling State interest to sustain the trial court's action. The only reason offered by the trial court for its use of the stepfather's race as a determining factor was its speculation that the child would be socially stigmatized. But as a number of State courts have recognized, speculation about prejudice in our society cannot be used to control the makeup of families.

For example, in *In re Marriage of Kramer*, 297 N.W. 2d 359, 361 (Iowa 1980), the Supreme Court of Iowa "emphatically reject[ed] the idea that parent child relationships are to be dictated by unsubstantiated judicial predictions concerning the effects of racial prejudice in the community. Community prejudice, even when shown to exist, cannot be permitted to control the makeup of families." In *Commonwealth ex rel. Lucas* v. *Kreischer*, 450 Pa. 352, 299 A.2d 243 (1973), the Supreme Court of Pennsylvania, reaching the same result, recognized that

> "in a multiracial society such as ours racial prejudice and tension are inevitable. If . . . children are raised in a happy and stable home, they will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such." [299 A.2d at 246 (quoting, with approval, lower court dissent).]

See also Beazley v. *Davis*, 92 Nev. 81, 545 P.2d 206 (1976); *Myers* v. *Myers*, 468 Pa. 134, 360 A.2d 587 (1976); *Edel* v. *Edel*, 97 Mich. App. 266, 293 N.W.2d

792 (1980); *In re H.*, 37 Ohio Misc. 123, 305 N.E.2d 815 (1973).

The Superior Court of Pennsylvania recently ruled that concerns about prejudice do not make race a relevant factor and that the trial court's consideration of race was an error "of the most serious dimension." *In re Custody of Temos*, 304 Pa. Super. 82, 450 A.2d 111, 120 (1982). The court stated:

> A court may not assume that because children will encounter prejudice in one parent's custody, their best interests will be served by giving them to the other parent. If the children are taunted and hurt because they live with a black man, with love and help they may surmount their hurt and grow up strong and decent—the sort of children any parent would be proud of. . . . [450 A.2d at 120 (citations omitted).]

The court emphasized that "a court must never *yield* to prejudice because it cannot *prevent* prejudice." *Id.* (emphasis in original). "A court should declare the law" and "should always exemplify" a "fundamental principle of our law . . . that all persons are created equal." *Id.* *See also DeLander* v. *DeLander*, 37 U.S.L.W. 2139 (Calif. Super. Ct. 1968) ("While the Constitution cannot prevent bigotry, it can prevent an individual from involving the State, through its Courts, in such bigotry.").

It cannot be denied, of course, that racial prejudice exists in our society. That fact, however, does not provide a compelling justification for a State to employ a racial classification, thereby reinforcing and perpetuating such prejudice. A State court should never surrender to prejudice and should not be permitted to throw the power of the State behind it. Any other result, we submit, would legitimize offensive racial classifications and would seriously undermine the central purpose of the Fourteenth Amendment. It would also permit the State, under the pretense of avoiding the stigmatization of one person

(the white child), to stigmatize others (the black stepfather, as well as other blacks and families with parents of different races). *Cf. Brown* v. *Board of Education*, *supra*, 347 U.S. at 494. It would further permit the State to deny petitioner and her child the right to "an unprejudiced hearing focused solely on an inquiry into what custody order would be in [the child's] best interest and welfare." *Beazley* v. *Davis*, *supra*, 545 P.2d at 208.

In short, the trial court's speculative concern about "social stigmatization" fails to provide the compelling State interest that is required to sustain a racial classification. In the absence of any other articulated State interest, "the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause." *McLaughlin* v. *Florida*, *supra*, 379 U.S. at 192-93.

II. A SUBSEQUENT INTERRACIAL MARRIAGE SHOULD NEVER BE A GROUND FOR ORDERING A CHANGE OF CUSTODY

The question presented for review by petitioner is whether the Equal Protection Clause prohibits a court from considering or relying upon a subsequent interracial marriage as a ground for ordering a change of custody. We have already shown that such a prohibition applies to the action taken by the trial court in this case. Nonetheless, because it is possible that this Court might consider, in the context of a remand for further proceedings, whether race may ever be a ground for ordering a change of custody, *amici* wish to address that broader question.

As we have already shown, racial classifications are inherently suspect and presumptively invalid. "[I]f they are ever to be upheld, they must be shown to be *necessary* to the accomplishment of some permissible state objective, independent of racial discrimination which it was the object of the Fourteenth Amendment to eliminate." *Loving* v. *Virginia*, *supra*, 388 U.S. at 11 (em-

phasis added). We are unaware of any decision of this Court that would permit a State to penalize a person (*e.g.*, revoke a mother's custody of her child) based on a racial classification. Indeed, in *McLaughlin* v. *Florida*, *supra*, 379 U.S. at 198, two members of the Court (Justices Stewart and Douglas) stated in a concurring opinion that they could not "conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense." *See also Loving* v. *Virginia*, *supra*, 388 U.S. at 19 (Stewart, J., concurring). More recently, in a dissenting opinion in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), two members of the Court (Justices Stewart and Rehnquist) stated that its decisional

> history contains one clear lesson. Under our Constitution, the government may never act to the detriment of a person solely because of that person's race. The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government. . . . [*Id.* at 525 (footnote omitted).]

In a change of custody case, the only legitimate interest of the Florida courts is whether there has been a "substantial change in the condition of the parties" that has "a direct bearing on the welfare of the child." *Culpepper* v. *Culpepper*, *supra*, 408 So.2d at 784. But those issues can and must be resolved without regard to race. The fitness of the home and of the individuals as parents should be the controlling factors. There is no reason why such fitness cannot be judged on racially-neutral terms. And "the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if [petitioner in this case] is a fit [mother], the State spites its own articulated goals when

it needlessly separates [her] from [her daughter]." *Stanley* v. *Illinois*, *supra*, 405 U.S. at 652-53.[4]

The modern trend of State court authority recognizes that race is not an appropriate consideration in a custody dispute. In *Beazley* v. *Davis*, *supra*, for example, the Supreme Court of Nevada reversed a trial court ruling that two children of a mixed marriage should remain in the custody of their black father because of their physicial characteristics. It held that the trial court improperly "restricted the right of the natural mother to be considered as the proper parent to have custody of her children" and "the children . . . were denied the benefit of an unprejudiced hearing focused solely on an inquiry into what custody order would be in their best interest and welfare." 545 P.2d at 208.

The Supreme Court of Pennsylvania has likewise recognized that race is not a relevant factor in a custody determination. In *Commonwealth ex rel. Lucas* v. *Kreischer*, *supra*, the Court considered whether a white mother's subsequent interracial marriage was a proper ground for revoking custody over her daughter. The Court ruled that it was not. 299 A.2d at 245-46. That ruling was reaffirmed in a similar factual context in

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[4] This Court is not presented with, and need not consider, whether race may play a role in a noncustody context (*e.g.*, an adoption case). But we wish to note for the record that the competing interests in a change of custody dispute differ sharply from the competing interests in an adoption context or in the context of other placements by the State (*e.g.*, foster care). In change of custody cases, the parties are most often, as here, natural parents, and the State is mediating a dispute between them. In adoption cases, by contrast, State and local instrumentalities confer parental rights upon individuals who lacked preexisting parental rights in the children adopted. *See, e.g., Drummond* v. *Fulton County Dept. of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978). As a consequence, in adoption or other governmental placement cases, the nature of the process and the private and governmental interests at stake are quite different. *See* 563 F.2d at 1204-11.

Myers v. *Myers*, *supra*, 360 A.2d at 591-92. In the recent case of *In re Custody of Temos*, *supra*, 450 A.2d at 120, the Superior Court of Pennsylvania stated in unequivocal terms:

> In a child custody case, race is not a "consideration," or "concern," or "factor." Questions about race are in no respect "appropriate." In stating that race "ought to be" a consideration, the lower court was fundamentally mistaken.

See also In re Marriage of Kramer, *supra*, 297 N.W.2d at 362 ("Sandi's relationship with her [black] male friend . . . has no bearing on [the] issue" of "the emotional and moral welfare of her children."); *Edel* v. *Edel*, *supra*, 298 N.W.2d at 796 ("The circuit court should redetermine Kristen's custody without reference to the race of the plaintiff's fiance."); *In re H.*, *supra*, 305 N.E.2d at 819 ("Certainly then Carol's marriage to a black man is of no significance in this case and does not support the neglect complaint."); *DeLander* v. *DeLander*, *supra*, 37 U.S.L.W. at 2139 ("[A]ny consideration of the stepfather's race, or of the race of the mother's associations, or of the neighborhood racial mix, would result in a Court making its determination on the basis of factors which the Fourteenth Amendment prohibits from consideration.").[5]

As these modern decisions recognize, a subsequent interracial marriage or relationship has no bearing on the critical issue in a custody dispute—the best interest of

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[5] There are other cases that have used race as a controlling factor or have stated that it may be a consideration. Many of those cases, however, predate this Court's more significant rulings under the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Ward* v. *Ward*, 36 Wash. 2d 143, 216 P.2d 755 (1950); *Fountaine* v. *Fountaine*, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956). Some of these earlier cases have been reconsidered in more recent decisions. *See, e.g., Tucker* v. *Tucker*, 14 Wash. App. 545, 542 P.2d 789, 791 (1975); *Stingley* v. *Wesch*, 77 Ill. App. 2d 472, 222 N.E.2d 505 (1966). *See generally* Annot., 10 A.L.R. 4th 796 (1981).

the child. That issue can be resolved, without regard to race, on the basis of the fitness of the parents occupying the respective homes. Use of a racial classification, therefore, cannot be shown to be "necessary" to a compelling State interest and is unlawful. *Loving* v. *Virginia*, *supra*, 388 U.S. at 11.

If this Court nevertheless decides that it is not prepared at this time to rule out consideration of race, we urge the Court to adopt, at an absolute minimum, strict guidelines requiring State courts to demonstrate that consideration of race in a custody case is necessary to a compelling State interest. We urge that those guidelines include the following requirements. First, State courts should be required to find that it is not possible to resolve the best interest and welfare of the child or similar considerations on racially-neutral terms. *See* pp. 14-16, *supra*. Second, they should be required to find that consideration of race is "necessary" to a compelling State interest. *See* p. 9, *supra*. Such "necessity" must exist wholly apart from any generalizations about the impact that prejudice in our society might have on children. *See* pp. 11-13, *supra*. Third, the record must contain clear and convincing evidence that demonstrates why race is a necessary and relevant consideration in the particular case before the court. The need for individual proof and convincing evidence in these circumstances is underscored by at least two decisions of this Court.

In *Stanley* v. *Illinois*, *supra*, the Court, on due process and equal protection grounds, invalidated a State statute which effectively presumed the unfitness of an unwed father. 405 U.S. at 657-59. The Court emphasized the danger of a State employing presumptions of unfitness and failing to evaluate individual circumstances—

> But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to

> past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. [*Id.* at 657 (footnote omitted).]

The Court further emphasized that: "The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove." *Id.* at 657-58.

The need for individual proof is further supported by *Santosky* v. *Kramer*, 455 U.S. 745 (1982), in which the Court held that the State of New York could not terminate parental rights unless it established "permanent neglect" by "clear and convincing evidence." *Id.* at 748. The Court recognized that the State had an interest in the welfare of the child and that the State's interest "is served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home." *Id.* at 767. In evaluating the appropriate standard of proof, both the majority and dissenting opinions agreed with the "conclusion that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Id.* at 774.

These decisions demonstrate that a State must be required to prove—not presume—allegations of parental unfitness and must have "clear and convincing evidence" before it alters parental rights. We believe that no less a standard should apply if a State attempts to use race as a relevant consideration in a change of custody dispute. State courts cannot be permitted to presume a need for a change of custody as a result of a subsequent interracial marriage, and the record of each proceeding must show by clear and convincing evidence why race is a necessary and relevant consideration. Only then could a

record even conceivably demonstrate that a racial classification is both "necessary" to, *Loving* v. *Virginia*, *supra*, 388 U.S. at 11, and "precisely tailored" to achieve, a compelling governmental interest. *Plyler* v. *Doe*, *supra*, 457 U.S. at 217.

CONCLUSION

The judgment of the District Court of Appeal of the State of Florida, Second District, should be reversed.

Respectfully submitted,

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Dated: December 6, 1983

APPENDIX

APPENDIX

November 25, 1983

United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

TO: THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE
UNITED STATES SUPREME COURT

A few weeks ago, my mother brought to my attention a newspaper article concerning a case (Palmore v. Sidoti) in which a white child was taken from her mother because her mother had remarried a black man. According to the article, the court in that case presumed that it would be detrimental to the white child's interest to be raised in an interracial home. As I read the article, I was appalled as I thought how that decision might affect my own life.

I am now sixteen years of age. When I was three, my mother (who is white) divorced my natural father (who is also white) and later remarried a black man, whom I have now come to call "dad." I no longer see my natural father and know little about him. However, over the past few years, I have sent him numerous letters requesting permission to be adopted by my dad. My natural father has answered none of these letters. I fear that he may still attempt to gain custody over me. If that happened, I would be forced to leave my family to live with a man I barely know and have not seen in more than five years.

I am writing this letter because I could be taken from my current home if the courts of this Nation are permitted to presume that an interracial home is an unfit home. I wish to relate to this Court my own experience of living in an interracial home for over twelve years. I hope that my experience in a loving and stable home

environment will show why courts should not be permitted to presume that an interracial home is detrimental to the interest of a white child.

As I think back to my early childhood, when my mother first met my dad (Tony), I remember little about the exact details. I remember nothing of his appearance, in particular of his race. My earliest recollection is of his coming to visit my mother's apartment in Washington, D.C. and his examining my ears to see if I had an ear infection.

In the Summer of that year, we moved to Boston, Massachusetts, and my mother and Tony were married in the Fall. We first lived on Beacon Hill, and I went to the Beacon Hill Nursery School. I have no recollection of the issue of race even arising, until my dad came to school one day to play the flute at naptime. I remember requesting that the lights be turned off, as was the normal procedure at naptime when we listened to records. I later learned that the teachers were alarmed by my request and called my parents in for a conference. The teachers were concerned that I might have wanted the lights to be turned down because my dad was black. I think that my dad (being a child psychiatrist) was satisfied that the color of his skin had nothing to do with my request. Although I do not think that my teachers were satisfied, the subject was dropped.

We spent the following year in England, where my dad was doing research. My mother (a psychologist) was not working at the time because she was pregnant (with my soon-to-be sister, Tanya). Throughout our stay in England, I do not recall a single problem resulting from my dad being black. The only difficulties that I faced stemmed from my having an American accent, which many of the children found humorous.

When we returned to Boston, we bought a house in the racially mixed community of South End, and I be-

gan to attend the Trotter School. It was a magnet school, meaning that white children were bused into a black neighborhood in which the school was situated. That particular year was the beginning of desegregation in a very segregated and prejudiced city. But I was only in second grade, and race meant little or nothing to children of my age. For second and third grades, my class was made up of an equal proportion of black and white children. My mom came to the school regularly to help some children with reading. My dad also visited the school. At the end of a talk that he gave, one of the boys asked to see his muscles, because I had told the boy how strong my dad was. I have a distinct recollection that everyone in the class was really impressed and thought that I was really neat to have a dad like that.

After third grade, I entered an advanced program that required me to switch to the Hennigan School. This is my first recollection of race really becoming important. Desegregation had reached its peak, as had various problems connected with it. For example, there were instances when windows in the school bus would get broken as we passed through black neighborhoods. In addition, the black children who rode on the school bus chose to sit in the back of the bus and the white children in front. For the first few weeks of school, some of the black girls picked on me, until one day my dad brought me to the bus stop and they found out that he was black. Although I never quite figured out why, they stopped bothering me at that point. But even then, race was only a concern on the school bus. Once in school, I was free to choose my friends regardless of race. As a result, I had just as many black friends as white ones.

As I got older, my parents used to tell me about various racial incidents occurring in Boston (demonstrations, fights, etc.). My mom and dad took part in one demonstration in South Boston, the heart of the most prejudiced neighborhood in the State. I recall that the police

protected the demonstrators until a policeman "by mistake" broke the line and a mob of white people broke through and a huge fight erupted. The Boston police did little to contain the situation. But because of my unique family situation, I was able to understand this and other incidents with a broader and clearer perspective than most of my white peers.

In the sixth grade, I attended the Bancroft School in my neighborhood. I was accepted as readily by the black children as by the white children. In the Spring of that year, I had my most unfortunate experience in race relations. With a class consisting equally of a number of different races, I went on a class field trip to the Arboretum. After lunch, about half of us decided to climb a hill behind us. In the process, we encountered about twenty strangers (all white children). Although we managed to avoid them at first, they later surrounded us. They were much bigger and began hitting the black children and burning them with cigarettes. These intruders ignored the white children in the class until we tried to help our friends. At that point, they began taunting us and calling us "nigger-lovers." They eventually left, and we were able to report the matter to the Park Police. A school board meeting was later called to discuss the problem. Although nothing very constructive resulted from the meeting, I think that there was a greater appreciation by the white children and their parents of problems facing black children. I mention this incident because I realized that this happened to me not because my father was black, but because of the racial tensions that existed in the community at that time.

The next year I began Boston Latin School, an old and well known public institution. It turned out to be different from every other school that I had previously attended—the white and Chinese children tended to stay together; the black children tended to stay together. Although I walked to school every day with a girl who was

of mixed racial background, we had our own group of friends during school, and we did not see each other until it was time to go home.

Seventh grade was the first time that I really worried about people finding out that my dad was black. Most of my close friends did not have black friends and did not particularly care to. I told friends that my dad was black only when they were about to meet him for the first time. I remember that one of my best friends said to me: "Really, wow what's that like?" But when I really thought about what I was doing, it seemed silly that I should have worried whether my friends would like me if they knew my dad was black. If they were not prepared to accept my dad, I would not have wanted to be friends with them. Reaching this awareness, I entered eighth grade more comfortable with myself, and I lost no friends because my dad was black.

After two years at Boston Latin, my family moved to St. Louis, Missouri. I now attend a very prestigious private school. At first, I again worried about how people might react to my dad being black. But early in the school year I called a close friend, told her that my dad was black and asked if that would bother people. She told me that a lot of people already knew and that it did not make any difference to them. In my class of 100, almost all of the children know that my dad is black, and like or dislike me without respect to that fact.

After being raised in an interracial home for over twelve years, I can say that my dad's race makes absolutely no difference to me. Although I worried about it from time to time, I now know that it was always an easy thing to handle. If people were going to judge me by the race of the man my mother chose to marry, I would not have cared to have their friendship, and there probably would have been something else to cause them to dislike me sooner or later.

But of far greater importance is the fact that I have been raised over the last twelve years in a happy and stable home. I am fortunate to have had a close and loving relationship with my mom, dad and sister. My home has prepared me to deal with any prejudice that I might have encountered and to recognize that people should not be prejudged. My personal experience has made me a more tolerant, sympathetic and understanding person, qualities which I hope to retain for a lifetime.

That completes my story. I hope that it will be helpful to this Court when it considers whether courts should be permitted to presume that an interracial home is detrimental to the interest of a white child.

I have asked Jay L. Carlson, my uncle and a Washington, D.C. lawyer, to assist me in presenting this letter to you in connection with the case of Palmore v. Sidoti.

Respectfully,

/s/

LEIGH EARLS